



POLICE DEPARTMENT

July 3, 2008

MEMORANDUM FOR: Police Commissioner

RE: Detective Virgil Cumberbatch  
Tax Registry No. 897278  
Narcotics Borough Brooklyn North  
Disciplinary Case No. 83273/07

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The above-named member of the Department appeared before me on April 2, 2008 charged with the following:

1. Detective Virgil Cumberbatch, while assigned to the Narcotics Borough Brooklyn North on March 15, 2006 at approximately 2230 hours at the EL Dorado restaurant in the vicinity of Belmont Avenue and Mother Gaston Boulevard in Kings County did wrongfully and without just cause use force as a member of the New York City Police Department, to wit: said Detective did grab and apply pressure to the throat of a person known to this Department without sufficient legal authority.

PG 203-11 Page 1, Paragraph 2 – USE OF FORCE

The Department was represented by Andre Applewhite, Esq. Department Advocate's Office and the Respondent was represented by Peter E. Brill, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Not Guilty.

SUMMARY OF EVIDENCE PRESENTEDThe Department's Case

The Department called Dwayne Robbins as its sole witness.

Dwayne Robbins

Robbins testified that he resides on [REDACTED] with his [REDACTED]

[REDACTED]. He stated that he is currently unemployed.

Robbins said that his residence is approximately [REDACTED] from the El Dorado Restaurant.

On March 15, 2006 at approximately 9:45 a.m., Robbins testified that he was on his way to work. He stated that he worked in construction doing demolition work "off the books" at that time. He first stopped in a corner store to pick up a 50 cent package of Advil because he had a headache. He then stopped in the El Dorado Restaurant and ordered a coffee and buttered roll. He also asked for a glass of water so that he could take his "aspirin." As he stood at the counter waiting for his order, he was "playing with his cell phone" when he was grabbed from behind. Robbins said he was grabbed in a "chokehold." He explained that the person who grabbed him placed one arm under his neck and the other arm went under his left arm.

Robbins said that he was grabbed and moved backward to a wall and slammed against the wall. The person who grabbed him stepped to his side and he was able to see his face. Then another individual came in through the door of the restaurant and grabbed him by the throat. Robbins stated that both individuals then threw him to the ground and started "kicking and stomping" him. Robbins said that he did not realize that these

individuals were police officers. He then observed "a few more officers" come into the restaurant and grab a Latin man to the left of him and an older African-American man and begin to beat the two of them to the ground. Robbins said that eventually he was raised up to his feet, handcuffed, thrown to a wall outside of the restaurant and put into a van. At no point did he have any communication with the people involved in the incident.

Robbins stated that when he arrived at the restaurant, there were six or seven people in there. He said that the restaurant was a place that he went to every morning. He did not go there in the evening. Robbins said the restaurant had a big, glass window. Once you walk through the door, to the left is a long counter against the window. To the right is a wall. He estimated that the space between the counter to the wall was approximately three feet. He noted that there is a lady standing where the food is ordered. There is a tall glass and the food is inside the shelves so one could see what is available to order. Robbins said he was about two feet away from the door in front of the counter when he was grabbed.

Robbins identified the Respondent as the person who grabbed him. He said he was an African-American about five feet five inches and chubby/stocky. He said the Respondent did not have his Police Department shield exposed at the time that he grabbed him and he did not identify himself as a police officer. He stated that no one identified himself as a police officer in the restaurant. He described the officer who came into the restaurant and grabbed him about the throat telling him to "spit it out" as a "Caucasian gentleman."

Robbins said that when he initially approached El Dorado Restaurant, he did not observe anyone outside of the restaurant. He stated that he never observed any drug transactions either inside or outside of the restaurant. He denied using any illegal substance on March 15, 2006 or on any other date. He recalled that he was arrested with another man named Robert Mercer who he knew from the neighborhood. He said another male, Phillip Ramos, was also arrested and he later met him at the station house. Robbins testified that he never had a person-to-person interview with anyone from the Civilian Complaint Review Board (CCRB). He explained that he was more concerned with keeping his job than being interviewed.

Robbins testified that he lost his job with the construction company the day after the incident with the police. He stated that he was unable to go to work the day of the incident and the following day, so he was replaced. Robbins stated that he has not filed a lawsuit against the City of New York with respect to this incident. He explained that he was afraid to get involved with the police who could come after him later. Robbins said that he was first arrested for assault in 1992 and served 24 months in jail. He was then arrested in 1995 for robbery and served 30 months in jail. Robbins stated that following the March 15, 2006 incident, he never came in contact with the Respondent again. He denied being arrested for drug possession or drug sale after the incident date.

During cross-examination, Robbins denied being arrested by the Respondent for drug possession and sale in December 2006. He was asked whether he filed a complaint with the CCRB alleging that his underwear was torn by the Respondent. Robbins stated that he had another CCRB case, but he did not know whether the Respondent was involved in that case because there were a lot of police officers who participated. When

asked how he became involved with the police on that date, Robbins explained that he was at a laundromat washing his clothes. He decided to go outside and smoke a cigarette while talking to a friend that he once played football with. An unmarked car drove up and an individual jumped out and started grabbing him in the groin area. He further explained that he was arrested that day and charged with possession of drugs. When asked why he stated during questioning that he was never arrested for drugs after the incident date, Robbins said that there was no true bill on the case, it was "thrown out" and he did not have anything against him. He acknowledged that he was handcuffed, fingerprinted, photographed, taken to Central Booking and charged with a crime that required him to report to court. He admitted that his answer to the attorney was not correct.

Robbins denied that he was known by the street name, "[REDACTED]" He stated that he was known by the name, "[REDACTED]," and if Ramos said he knew him by the name, "[REDACTED]," Ramos was incorrect. He stated that he met Ramos for the first time after they were both arrested. He denied that when he came to court on this matter, he came with Ramos. He stated that when he arrived, Ramos was already present in court. Robbins reiterated that he was doing nothing when the Respondent randomly grabbed him about the throat. He noted that the Respondent grabbed him from behind and that he had to already have been in the restaurant because he would have observed him come through the door.

Robbins described the way the Respondent held him as the street term, "yoke hold." He explained that the Respondent placed one arm under his neck area and his other arm interlocked his left arm. He further explained that this prevented him from being able to move. Simultaneously the other officers came into the restaurant and

“stomped” the other people. Robbins said he was stomped multiple times while he was on his belly handcuffed. He could not put a number on how many times he was stomped because he was lying on his belly handcuffed. He did not know who was stomping him either. Robbins then recalled that after he was kicked and stomped he was handcuffed.

Robbins was questioned as to whether he had been arrested again following his [REDACTED]. He stated he had been arrested for a parole violation. He explained that the parole violation was for not reporting. He stated that he was not charged with other violations and that his penalty was that he receive the maximum time on his previous sentence. He further explained that he was mandated to attend outpatient treatment but he did not go because he had a violent report [violence problem] and did not have a drug problem. He was questioned as to whether his urine samples “came back dirty” for any drugs and he denied that took place. Robbins did not agree that he was being sent to an outpatient because he had a drug problem. He stated that there was no violence program available for him and they [probation] did not want him to be idle so they decided to send him to a drug program. Eventually Robbins agreed that he was sent to a drug program because he “tested dirty in his urine for marijuana and alcohol.”

Robbins acknowledged that he is currently unemployed. He stated that between 2000 and 2006 he supported himself by working. He said that currently he supports himself on public assistance. Robbins denied that he had an arrest in [REDACTED] in 2003 for drug possession. He testified that he does not go to [REDACTED].

The Respondent's Case

Respondent's Exhibit (RX) A is a four-page document. Page One is a Criminal Court Complaint from the City of New York in the County of Kings in the case of The People of the State of New York v. Dwayne Robbins. The complaint stated in sum and substance that the Respondent on December 8, 2006 at approximately 11:00 A.M. observed the defendant commit the following offenses: criminal possession of a controlled substance in the seventh degree- two counts and criminal possession of a controlled substance in the third degree- two counts. The complaint further stated that the defendant was observed in possession of a quantity of heroin and a quantity of crack cocaine which was recovered, i.e., two glassine envelopes containing heroin from the defendant's hand and four zip lock bags containing crack cocaine from the ground where the defendant was observed dropping the crack cocaine.

Page Two is a Brooklyn field test report. The prisoner's name is Dwayne Robbins, his date of arrest is December 8, 2006, his date of birth is June 4, 1964 and the testing officer's name is the Respondent assigned to the Brooklyn North Narcotics Division. The field test report noted that four zip lock packages of crack cocaine were recovered when the defendant dropped them. Page Three is a Property Clerk's Invoice No. N459886 and it notes that it is arrest evidence. The report was prepared on December 8, 2006. The report noted that one glassine of heroin labeled "FTP" was recovered. Also recovered was one Ziploc bag of crack cocaine labeled "FTP," and three Ziploc bags of crack cocaine. Page Four is a New York City Police Department mug shot pedigree for Dwayne Robbins. The arrest number is Q03611744 and the arrest was for petit larceny. Robbins' date of birth is [REDACTED] and the physical description is of

a black male who is clean-shaven and the photograph is indicative of Robbins who is the complainant who testified in this matter.

Detective Virgil Cumberbatch

The Respondent testified in his own behalf.

The Respondent is a seventeen-and-a-half-year member of the Department currently assigned to the Brooklyn North Narcotics Division. He has been assigned to the Brooklyn North Narcotics Division for the past twelve years and was promoted to the rank of Detective Second Grade in December 2006. He explained that he works in the capacity of investigator and has performed narcotics-related investigations and made arrests during his assignment. He stated that he has not been assigned in an undercover capacity. The Respondent testified that in the twelve years that he has been assigned to his command, he has familiarized himself with the standard operating practices for narcotics transactions and that he has been assigned within the confines of the 73 Precinct for the entire time.

The Respondent testified that the El Dorado Restaurant is within the confines of the 73 Precinct. The restaurant is located close to the corner of Belmont and Stone avenues. He said that he has locked up hundreds of people in that area for drug possession as well as sale of narcotics and he would describe the location as a drug-prone location. He estimated that he has made over 1200 arrests in his career, 60 percent of those arrests were for narcotics-related offenses. The Respondent stated that he has one other substantiated CCRB complaint that is for threatening to use mace on someone. He said that he has never received any excessive force complaints and has never had any



prior disciplinary charges and specifications nor been on force monitoring. He stated that in addition to his promotion to the rank of Detective Second Grade, he has received numerous Excellent Police Duty and Meritorious Police Duty medals in his career.

Prior to March 15, 2006 the Respondent stated that he had not had contact with Robbins. After March 15, 2006 he stated that he observed Robbins make a hand-to-hand transaction selling drugs to an individual who was not apprehended. He stated that Robbins was arrested as a result of that transaction and that drugs were recovered from him. He believed the date was December 8, 2006. The Respondent acknowledged that as a result of that interaction with Robbins, Robbins did file another CCRB complaint against him and the outcome of that complaint was still pending.

On March 15, 2006 the Respondent stated that he was doing observation of drug sales. He explained that he along with his field team had set up outside of the El Dorado Restaurant because they received several complaints of drug activity in the area. He was with a Detective Bannister at that time. He said that he was positioned across the street from El Dorado Restaurant in a vehicle on Belmont Avenue. He had a clear view of the restaurant from where he was seated. The Respondent testified that he observed Mercer do a hand-to-hand drug transaction with another individual. That other individual was arrested. Mercer proceeded into the restaurant and the Respondent went into the restaurant to look for him. The Respondent stated as he entered the restaurant with his partner Bannister to look for Mercer, he was unable to locate him. As he was about to leave the restaurant, he looked to his left and observed Robbins hand Ramos a quantity of heroin.

The Respondent explained that both Robbins and Ramos had their backs to the counter and were actually facing out toward him. He estimated that he was one foot away from Robbins and Ramos when Robbins handed Ramos a glassine of heroin. The Respondent described the way he handed the heroin to Ramos as on a "sneak tip." Just as Robbins looked at the Respondent, he then grabbed the heroin back from Ramos and put it in his mouth. The Respondent testified at that time he grabbed Robbins' jaw. He explained that he placed his index finger on the left side of Robbins' face his thumb was on his right side and he told him to spit out the drugs.

The Respondent stated that he could tell Robbins had swallowed the drugs by the motions he made. He then told Robbins to get down. He explained that Robbins resisted a little bit and he pushed him down to the ground and placed handcuffs on him. He said there was some commotion because there were people in the restaurant who were screaming and Ramos who was also placed under arrest was also resisting. The Respondent said that Mercer also appeared from behind him. He stated that his field team also entered the restaurant which created a lot of activity.

The Respondent denied that he had to punch or kick Robbins to place him under arrest. He explained that he locked his own arm with Robbins' arm and placed him down to the ground. He said that Robbins was resisting so he just had to pull his arms from under him to get him in handcuffs. He could not recall if he had any help getting Robbins handcuffed. The Respondent said Robbins was taken to the van where pedigree information was taken from him. He recalled that Robbins repeatedly said, "I didn't swallow sh\*\*."

The Respondent testified that Robbins did not complain of being injured or having trouble breathing. He explained that if he did, he would have taken him to the hospital. He stated that Robbins had no observable injuries. He said that he charged Robbins with possession and sale of heroin. The Respondent denied that he ever grabbed Robbins in the neck or throat area. He also denied holding him in any type of "yoke hold."

During cross-examination, the Respondent was asked whether people who lived in the neighborhood and who were not drug users went to the El Dorado restaurant. The Respondent said that he did not believe they did. He said that from what he observed, everyone he observed in the restaurant at any given time appeared to be from the methadone clinic. When asked about the cook and the cashier at the restaurant, the Respondent replied that one of the cooks was a drug user, but he did not personally know the cashier. He acknowledged that it was possible that everyone in the restaurant was not a drug user.

The Respondent admitted that he gave a statement to CCRB that Mercer had made several drug transactions outside of the restaurant. He agreed that Mercer had been retrieving the drugs from a black backpack. The Respondent said that the backpack was in a van parked in front of the restaurant. The Respondent denied that he told CCRB that Robbins was retrieving drugs from the back pack. He explained that he used the name, "Roberts" because at the time of the arrest, there was confusion as to who Robbins was and who Mercer was. The Respondent further explained that he never saw Robbins outside of the restaurant. The Respondent said that he never recovered the black

backpack and to his knowledge, his field team never recovered it from the van because the van was locked and no further investigation was made into the van.

The Respondent estimated that there were 20 people in the restaurant when he walked in. He observed some parents with their children. He then observed Robbins hand Ramos the glassine of heroin. He explained that when he used the words, "sneak tip" to describe how Robbins handed Ramos the drugs, he meant that he did not hand over the drugs openly. He slid it to him with an open hand while the drugs were in between his fingertips. He denied that Robbins really had Advil because he observed a powder substance in a glassine.

Just as he made eye contact with Robbins, the Respondent said that Robbins snatched back the glassine and put it in his mouth. The Respondent stated that he was right next to Robbins so he grabbed his jaw and told him to spit out the drugs. He said that he did not want Robbins to hurt himself by swallowing the drugs. He denied placing Robbins in a chokehold. He explained that he is not allowed to use chokeholds. The Respondent acknowledged that El Dorado Restaurant closed down two days after this incident.

The Respondent admitted that he knew that the El Dorado Restaurant had a video camera. He acknowledged that he went to the restaurant and asked the owner for the video. He explained that he wanted to corroborate the fact that drug sales were taking place in the location. He denied that he wanted to secure the tape because it would show him putting Robbins in a chokehold. The Respondent stated that he did not put Robbins in a choke hold. He said that the owner stated that he did not have a video. The Respondent denied that he ordered the owner to close down the restaurant because he did

not produce the video for him. He explained that it would be impossible for him to get the owner to close down. In addition, he stated that the owner spoke Spanish and he was not fluent in Spanish, so he only asked about the video and when he said he did not have it, he ended the conversation with him.

During redirect examination, the Respondent testified that since Robbins was taller than him, he would have to jump on his shoulder to place him in a chokehold. He stated that he brought him to the ground and Robbins was face down. He explained that he did not have to use force to get him to the ground, but he did have to pull his arms from under his chest to place him in handcuffs.

During further cross-examination, the Respondent stated that he was five feet six inches tall. He estimated that Robbins was six feet two inches tall. When he was advised that Robbins was only five feet seven inches tall, the Respondent replied that he thought he was a lot taller than him.

During questioning by the Court, the Respondent testified that he made a second arrest of Robbins. He observed him receive money from an individual in return for him supplying the individual with crack. The Respondent said that he radioed for his field team to arrest the individual, but they were unable to locate him. Robbins was then arrested for drug possession and sale. He explained that Robbins had crack and heroin in his possession at the time of his arrest. He acknowledged that there was police paperwork in connection with this arrest.<sup>1</sup> He further explained that he was interviewed by CCRB in connection with this case and the only allegation he was questioned about was whether he tore Robbins' underwear during the arrest.

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<sup>1</sup> Based on the Respondent's testimony, the Court directed that he obtain the police paperwork in connection with the December arrest. Said documents came into evidence as RX A.

With regard to the March 15, 2006 allegation, the Respondent said that children were in the restaurant at the time of the incident and he acknowledged that the children were not drug users. But he stated that the people accompanying the children were drug users. He said that people who frequented the restaurant went to the methadone clinic and people who were on their way to work did not stop at that restaurant. The Respondent acknowledged that he heard the testimony of Robbins describing a "yoke." He said that he knew what a "yoke hold" was and that he did not touch Robbins like that. The Respondent said that when he grabbed Robbins' face and ordered him to spit out the drugs, he may have come in contact with the area right under his chin, but he did not touch his neck. He also acknowledged that to bring Robbins down to the ground he did not come in contact with his neck, throat or windpipe.

### FINDINGS AND ANALYSIS

The Respondent stands charged with wrongfully and without just cause using force as a member of the Department in that he did grab and apply pressure to the throat of Robbins without sufficient legal authority. The Respondent is found Not Guilty as charged. This Court found the testimony of Robbins to be incredible and not worthy of belief and as such, his testimony standing alone could not be the basis of a finding of guilt.

Robbins testified at this proceeding that on the date of the incident on March 15, 2006 he was working "off the books" at a construction company doing demolition work. Prior to reporting to work, he stopped at a store and purchased a 50 cent pack of Advil and then proceeded to El Dorado Restaurant where he ordered a coffee and buttered roll.

He asked for a glass of water to take his “aspirin” and then he stood at the counter playing with his cell phone. The next thing he knew, he was grabbed from behind in the neck area.

He described a “yoke hold” and being grabbed under the neck with one hand and the other hand locked his arms as he was moved to a wall by the Respondent. After being “slammed in the wall” by the Respondent, Robbins said he was kicked and stomped by unidentified individuals. Robbins testified that no one ever spoke to him. He never testified about any physical symptoms he sustained from being held in a chokehold and subsequently thrown into the wall, kicked and stomped. He also never testified that he sought any medical treatment in connection with this beating. Furthermore, his testimony was inconsistent. He first stated that he was thrown to a wall and then kicked and stomped while handcuffed on his belly. He later testified that he was kicked and stomped on the ground, raised up and then handcuffed. Robbins wanted this Court to believe that he was stopped because he swallowed Advil or “aspirin,” yet he testified that two other males were also kicked and stomped and he gave no explanation as to why they were arrested. The Court found Robbins’ testimony to be incredible and not worthy of belief.

Robbins went on to testify that he never participated in an interview with CCRB because his major concern was to keep his job. Yet he also testified that as a result of the arrest, he did not report to work for the next two days and was replaced. The latter testimony is at odds with his previous statement because Robbins had already been fired from his demolition position two days after the incident; therefore he was available to give a statement to CCRB.

Robbins testified on direct examination that he was held in a chokehold, yet he never described having troubling breathing. He testified during cross-examination that the Respondent held him in a "yoke hold." He described being grabbed with one arm under the neck and the other arm locking his arm preventing him from freely moving, but he never described being grabbed and pressure being applied to his throat by the Respondent. In fact, Robbins testified that another officer, "a Caucasian gentleman" not the Respondent, grabbed him in the neck area and told him to spit out the drugs, but that was not a chokehold either and it was not done by the Respondent who he described as "African-American."

Robbins continued to testify in a less than candid fashion. He stated that he was ordered to a drug program and never attended because he had a violence problem not a drug problem. He later admitted during cross-examination that while on probation his urine sample was "dirty for marijuana and alcohol." He testified that he had never been subsequently arrested by the Respondent for drugs, yet the Respondent testified that he arrested Robbins for drug possession and sale and upon additional questioning by this Court, provided the police paperwork to support this testimony (RX A).

Robbins testified that he never goes to Queens County and therefore could not have been arrested there, yet his mug shot pedigree (See RX A) shows him with an arrest in Queens County in 2003 for petit larceny. Robbins also testified that since he lost his job in March of 2006 he supports himself on public assistance, yet his Criminal Court Complaint for his arrest by the Respondent on December 8, 2006 shows a hand-to-hand transaction for heroin in exchange for cash; and when he was arrested, the Property Clerk's Invoice No. N 459886 shows that he was in possession of two glassines of



heroin, a Ziploc bag of crack cocaine labeled "FTP" and three other Ziploc bags of crack cocaine. This would lead one to believe that Robbins was supporting himself on more than public assistance. I repeatedly found that Robbins testified in a contrived, incredible manner and as such I could not credit his testimony.

On the other hand, the Respondent's testimony was credible. He denied during direct as well as cross-examination that he ever held Robbins in a chokehold or that he placed his hand in the area of Robbins' neck. His testimony during direct examination as well as cross-examination never wavered from the fact that he stopped Robbins and never used unnecessary force to arrest him. In addition, his testimony was corroborated by the evidence he supplied to this Court.

Accordingly, I find the Respondent Not Guilty as charged.

**APPROVED**

DEC 01 2008  
*Raymond W. Kelly*  
RAYMOND W. KELLY  
POLICE COMMISSIONER

Respectfully submitted,

*Claudia Daniels-DePeyster*  
Claudia Daniels-DePeyster  
Assistant Deputy Commissioner-Trials